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No.

In the

Supreme Court of the United States

RAYMOND B. YATES, M.D.,P.C. Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act ("ERISA") expressly grants sole shareholder corporations, partners and sole proprietors the right to be "participants" in an "employee benefit plan", as those terms are defined in ERISA, if other non-spouse employees participate in the employee benefit plan. Nine circuit courts of appeals and the Department of Labor ("DOL") have reviewed ERISA, and its regulations, and reached the same conclusion. This Court's holding in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), provides that the common-law definition of employee should be used to determine who may be a "participant" in an employee benefit plan. Nonetheless, the Sixth Circuit held in *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002) (Appendix, pp. 1a-8a, 51a-52a), that a different definition of "employee" should be used to determine whether such persons can participate in an employee benefit plan.

The question presented is whether a one hundred percent (100%) shareholder of a corporate employer, partner or a sole proprietor can qualify as a participant in an employee benefit plan sponsored by the employer in which other non-spouse employees, as defined in 29 C.F.R. § 2510.3-3(c), participate, and thus, be entitled to enforce the restrictions against alienation contained in § 206(d) of ERISA and § 401(a)(13) of the Internal Revenue Code ("Code").

PARTIES

PETITIONERS - APPELLANTS

(1) Raymond B. Yates, M.D., P.C. Profit Sharing Plan

(2) Raymond B. Yates, Trustee

RESPONDENT - APPELLEE

(1) William T. Hendon, Bankruptcy Trustee

STATEMENT PURSUANT TO RULE 29.6

Petitioner Raymond B. Yates, M.D., P.C. Profit Sharing Plan states that it has no corporate parents, and that no publicly held company owns 10% or more of Raymond B. Yates, M.D., Profit Sharing Plan's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Judgment and Memorandum of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, Adversary Proc. No. 98-3088, granting the Respondent's Motion for Summary Judgment and denying Petitioners' Motion for Summary Judgment has not been officially reported but is contained in the record (R. 23 and 24, Memorandum Opinion and Judgment) (Appendix, pp. 36a-50a). The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, affirming the Bankruptcy Court's decision has not been officially reported but is contained in the record (R. 10 and 11, Memorandum Opinion and Order) (Appendix, pp. 9a-36a). The opinion of the Court of Appeals for the Sixth Circuit affirming the District Court opinion is published at 287 F.3d 521 (6th Cir. 2002) (Appendix, pp. 1a-8a). The order of the Court of Appeals for the Sixth Circuit denying rehearing en banc is published at 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002) (Appendix, pp. 51a-52a).

STATEMENT OF JURISDICTION

The opinion of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, granted Respondent's Motion for Summary Judgment and denied Petitioners' Motion for Summary Judgment. This decision was affirmed by the United States District Court for the Eastern District of Tennessee on June 26, 2001. On April 19, 2002 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. Petitioners filed a Petition for Rehearing En Banc with the Sixth Circuit Court of Appeals, which was

denied on June 20, 2002. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The statutory and regulatory provisions of the ERISA, 29 U.S.C. § 1001 *et seq.* and the Internal Revenue Code relevant to this Petition are reprinted in the Appendix at pages 53a-68a.

STATEMENT OF THE CASE

Raymond B. Yates, M.D., P.C. is a professional corporation (the "Yates, P.C."), wholly owned by Petitioner Dr. Yates. On July 20, 1989, Yates, P.C. created a profit sharing/pension plan (the "Plan"), which was an "employee benefit plan" as defined in ERISA § 3(2) [29 U.S.C. § 1002(2)] and qualified for tax purposes under Code § 401 [26 U.S.C. § 401]. In addition to being the sole owner of Yates, P.C. and the administrator and trustee of the Plan, Dr. Yates participated in the Plan as an employee. From the time of its inception, the Plan always had at least one additional participant who was not related to Dr. Yates. As of June 30, 1996, in addition to Dr. Yates, there were three participants in the Plan, none of whom were related to Dr. Yates.

In his capacity as an employee-participant in the Plan, Dr. Yates borrowed against his interest in the Plan under the "Model Loan Program" which was incorporated into the Plan by the Adoption Agreement.[1] On December 13, 1989, Dr. Yates executed a promissory note in the principal amount of $20,000.00[2] at an eleven percent rate of interest until default

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[1] Section 14 of the Adoption Agreement permitted the Plan to establish a participant loan program. The particular loan program adopted by the Plan was entitled "Model Loan Program," and was attached to the Adoption Agreement as an exhibit.

[2] Dr. Yates originally borrowed from the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan. The loan transferred to the Profit Sharing Plan in 1992, when the Money Purchase Pension Plan merged into the Profit Sharing Plan.

and a five-year repayment period, which was extended for another five years on June 12, 1992. Also on December 13, 1989, Dr. Yates executed an irrevocable pledge and assignment to secure the indebtedness to be repaid under the promissory note. In the irrevocable pledge and assignment, Dr. Yates pledged and assigned to the trustee of the Plan an interest in his vested employer account balance. The Plan also includes a "spendthrift clause" that protects the assets of the Plan from assignment or alienation as provided in ERISA § 206(d) [29 U.S.C. § 1056(d)] (Appendix, pp. 62a-68a) and Code § 401(a)(13) [26 U.S.C. § 401(a)(13)] (Appendix, pp. 56a-58a).[3]

In November 1996, Dr. Yates repaid the entire debt to the Plan by making two payments. Together, the payments totaled $50,467.46 and represented the total amount of principal and interest due under the promissory note. After these repayments, Dr. Yates' interest in the Plan was approximately $87,000. On December 2, 1996, an involuntary petition under Chapter 7, Title XI of the United States Code was filed against Dr. Yates. Dr. Yates claimed his entire interest in the Plan as exempt property on Schedule B of his bankruptcy schedules under ERISA, the Internal Revenue Code and Tenn. Code Ann. § 26-2-104(b).

On August 5, 1998, the Respondent filed an adversary proceeding against the Plan and Dr. Yates, as the Plan's trustee, seeking to avoid the $50,467.46 loan repayments by Dr. Yates to the Plan in November, 1996 as a preference under 11 U.S.C. § 547(b). However, the Plan and Dr. Yates, as the Plan's trustee, asserted that the Respondent could not recover these payments because they represented Dr. Yates' interest in an ERISA-qualified plan and were excluded from his bankruptcy estate.

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[3] There are two exceptions to the anti-alienation provisions of the Plan which are not issues in this case. One exception is a loan from the Plan, and the second is for a qualified domestic relations order as defined in Code § 414(p) [26 U.S.C. § 414(p)].

The parties to the adversary proceeding filed cross motions for summary judgment. The Bankruptcy Court granted the Respondent's Motion for Summary Judgment and denied the Plan's and Dr. Yates' Motion for Summary Judgment. (Appendix, pp. 36a-50a). Specifically, the Bankruptcy Court ruled that the Respondent could recover the November 1996 payments Dr. Yates made to the Plan because Dr. Yates was not eligible to participate in the Plan. The Bankruptcy Court held that "[t]he Debtor in this matter is a self-employed owner of the professional corporation that sponsors the pension plan at issue. He cannot participate as an employee under ERISA and he cannot use its provisions to enforce the restriction on the transfer of his beneficial interest in the Defendant Plan." (Appendix, pp. 43a-44a). This holding was based on the decision of the Sixth Circuit Court of Appeals in *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966, 113 S.Ct. 1401, 122 L.Ed.2d 774 (1993), which held that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Id.* at 186.

The United States District Court for the Eastern District of Tennessee, at Knoxville, affirmed the decision of the Bankruptcy Court and further stated that "[w]hile the Plan may be ERISA-qualified as to other participants, the court found it is not ERISA-qualified as to Dr. Yates". (Appendix, p. 14a).[4] On April 19, 2002, the Court of Appeals for the Sixth Circuit affirmed the decisions of the lower courts stating that "[u]nder circuit precedent by which this panel is bound, in short, it is clear that the spendthrift clause in the Yates profit sharing/pension plan is not enforceable by Dr. Yates under ERISA. Neither is the spendthrift clause enforceable under Tennessee statutory law." (Appendix, pp. 6a-7a). The Sixth Circuit also held that:

> Our published caselaw teaches that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992). As an "employer," a sole shareholder cannot qualify as a "participant or beneficiary" in an ERISA pension plan. *Id.*; *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000). The sole shareholder "is not an ERISA entity," in other words, and "does not have standing under the ERISA enforcement mechanisms. *Agrawal*, 205 F.3d at 302.

[4] There is no basis in ERISA to conclude that one employee benefit plan would have two groups of participants (owners and non-owners) in the same plan but be subject to two different legal enforcement schemes.

(Appendix, p. 5a).

The Petitioners timely filed a Petition for Rehearing En Banc, which was denied by the Court of Appeals for the Sixth Circuit on June 20, 2002. *Yates*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). (Appendix, pp. 51a-52a). The Petitioners file this Petition for Writ of Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

REASONS FOR GRANTING THE WRIT

I. There is a conflict between the Circuit Courts of Appeals as to whether a 100% shareholder, partner or sole proprietor can be a "participant" in an employee benefit plan.

The decision in *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002), conflicts with the decisions of nine other circuit courts, as well as opinion letters from the United States Department of Labor.[5] The only other circuit

[5] *Schwartz v. Gordon*, 761 F.2d 864 (2nd Cir. 1985); *Leckey v. Stefano*, 263 F.3d 267 (3rd Cir. 2001); *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352 (3rd Cir. 1999); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S.Ct. 1401, 128 L.Ed.2d 74 (1994); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th

court to agree with the Sixth Circuit on the issue presented in this case is the First Circuit Court of Appeals,[6] which also held that a business owner, such as Dr. Yates, cannot be a participant in an employee benefit plan because of his dual role of employer and employee. Therefore, there are two Circuit Courts of Appeals that agree that individuals such as Dr. Yates cannot be a participant in an employee benefit plan because of their dual role as employer and employee and nine Circuit Courts of Appeals that have determined that individuals such as Dr. Yates can be a participant in an employee benefit plan based on a plain reading of 29 C.F.R. § 2510.3-3.

The decision of the Sixth Circuit in *Yates* was based on the Sixth Circuit's prior decisions in *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966, 113 S.Ct. 1401, 122 L.Ed.2d 774 (1993), and *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000), *reh'g denied*, 2000 U.S. App. LEXIS 6844 (6th Cir. April 6, 2000). The Sixth Circuit recognized the problems with the reasoning in the *Fugarino* decision when it stated in *Agrawal*, "[a]lthough the decision in the present case is preordained by the *Fugarino* holding, we note that the reasoning underlying the *Fugarino* decision is not thoroughly consistent with the goals of ERISA." *Agrawal*, 205 F.3d at 302. The Sixth Circuit further stated in *Agrawal* that "[t]his limiting definition of employee [referring to 29 C.F.R. § 2510.3-3(c)(1)] addresses the threshold issue of whether an ERISA plan exists. It is not consistent with the purpose of ERISA to apply this limiting definition of employee to the

Cir. 1999); *In re Baker*, 114 F.3d 636 (7th Cir. 1997); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995); *LaVenture v. Prudential Ins. Co. of Am.*, 237 F.3d 1042 (9th Cir. 2001); *Watson v. Proctor (In re Watson)*, 161 F.3d 593 (9th Cir. 1998); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995); *Sipma v. Mass. Casualty Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001); *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); ERISA Opinion Letter 79-08A, Jan. 30, 1979; and ERISA Opinion Letter 99-04A, Feb. 4, 1999.

[6] *Kwatcher v. Mass. Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989).

statutory definitions of participant and beneficiary." *Agrawal*, 205 F.3d at 303.[7]

A. <u>The holding in *Yates* conflicts with a plain reading of ERISA.</u>

The holding in *Yates* is based on an incomplete reading and misapplication of the provisions of 29 C.F.R. § 2510.3-3(c)(1). (Appendix, p. 53a). Section 2510.3-3 is entitled "Employee Benefit Plan" and serves only to "clarify the definition in section 3(3) of the term 'employee benefit plan' [29 U.S.C. § 1002(3)] for purposes of title I of the Act and this chapter." 29 C.F.R. § 2510.3-3(a) (Appendix, p. 53a). Section (b) of this regulation defines plans without employees and provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan . . . ." *Id.* (Appendix, p. 53a). Section (c) sets forth the definition of "employee" for purposes of determining whether the employee benefit plan has employees. An individual or his or her spouse are not deemed to be "employees" of an employer that is wholly owned by the individual or by the individual and his or her spouse for the purpose of determining if an "employee benefit plan" exists. (Appendix, p. 53a). Therefore, if the only participants of an employee benefit plan are the owner and his or her spouse, that plan does not meet the definition of an "employee benefit plan" under ERISA. However, if the employee benefit plan benefits employees other than the sole owner (and his or her spouse), the plan meets the definition of "employee benefit plan" and

[7] The Sixth Circuit, in *Fugarino* and *Yates*, held that the definition of "employee" in 29 C.F.R. § 2510.3-3(c)(1) is also determinative of who is considered an "employee" for purposes of the definition of "participant" found in ERISA § 3(7) [29 U.S.C. § 1002(7)] (Appendix, pp. 61a-62a). The definition of "employee" is found in ERISA § 3(6) [29 U.S.C. § 1002(6)]. (Appendix, p. 61a). This Court, in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), held that the common-law definition of "employee" is to be used to determine whether a person is an "employee" for purposes of ERISA § 3(6) [29 U.S.C.§ 1002(6)]. The *Yates* decision conflicts with the holding of *Darden* and is addressed later in this Petition.

is entitled to all the protections of ERISA, including those contained in the anti-alienation provisions. *29 C.F.R. § 2510.3-3* (Appendix, pp. 53a-55a). The preceding regulation is not determinative of whether an individual is an "employee" or a "participant" in an employee benefit plan. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

Nine other circuits, as argued above, have interpreted 29 C.F.R. § 2510.3-3(c)(1) to apply only to the determination of whether an "employee benefit plan" exists, not to the question of whether an individual can be a "participant" in an employee benefit plan. These circuits have interpreted this regulation to mean that an employee benefit plan exists if the plan benefits "employees" other than the sole owner of the corporation, a partner or a sole proprietor. *Cf.*, *Schwartz v. Gordon*, 761 F.2d 864 (2nd Cir. 1985); *Leckey v. Stefano*, 263 F.3d 267 (3rd Cir. 2001); *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352 (3rd Cir. 1999); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S.Ct. 1401, 128 L.Ed.2d 74 (1994); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999); *In re Baker*, 114 F.3d 636 (7th Cir. 1997); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995); *LaVenture v. Prudential Ins. Co. of Am.*, 237 F.3d 1042 (9th Cir. 2001); *Watson v. Proctor (In re Watson)*, 161 F.3d 593 (9th Cir. 1998); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995); *Sipma v. Mass. Casualty Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001); and *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999). The holding of the Sixth Circuit in *Yates* is in conflict with the holdings of the above cases. For this reason, this case accordingly merits this Court's review.

B. <u>The holding in *Yates* conflicts with Department of Labor Advisory Opinions.</u>

In ERISA Opinion Letter 79-08A, the Department of Labor ("DOL") was asked whether the employed wife of the owner of a company was eligible to be a participant in an employee benefit plan sponsored by the company. In

rendering its opinion that the wife was a participant in the plan, the DOL stated that 29 C.F.R. § 2510.3-3:

> is not intended to construe "employee" as that term is used in section 3(6) of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of the Fund as properly administered according to all applicable laws and plan documents.

ERISA Opinion Letter 79-08A, Jan. 30, 1979.

The DOL has also issued an advisory opinion recognizing that "working owners" of businesses can be participants in employee benefit plans. In ERISA Opinion Letter 99-04A, the DOL addressed the issue of whether individuals who own business enterprises, either as sole proprietors, partners or shareholders, and who provide personal services to those businesses can be "participants" in an employee benefit plan under ERISA. In concluding that such individuals could be participants, the DOL stated:

> In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended

> that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).
>
> ERISA Opinion Letter 99-04A, Feb. 4, 1999.

For the above reasons, this case warrants this Court's review.

II. The issue presented in this Petition is an important question of federal law that has not been, but should be, settled by this Court.

The issue presented in *Yates* has been reviewed by eleven Circuit Courts of Appeals and specifically addressed by the DOL in two opinion letters. However, this Court has not ruled on the issue presented in *Yates*. It is Petitioner's belief that this Court should grant this Petition so that the issue presented in *Yates* may be resolved. Currently, nine circuit courts and the DOL disagree with the interpretation of 29 C.F.R. 2510.3-3 set forth by the First and Sixth Circuit Courts of Appeals. Accordingly, this case merits review by this Court to resolve the conflict among the circuits and address this important area of federal law.

III. The holding by the Sixth Circuit Court of Appeals in *Yates* conflicts with the decision of this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

The decision in *Yates* conflicts with this Court's holding in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). In *Darden*, this Court adopted a common-law test for determining who is an "employee" under ERISA § 3(6) [29 U.S.C. § 1002(6)]. (Appendix, p. 61a). The definition of "employee" is important because this term is used to determine who can be a "participant", as defined ERISA 3(7) [29 U.S.C. § 1002(7)]. (Appendix, pp. 61a-62a). However, the Sixth Circuit, in *Yates*, misapplied the limiting definition of "employee" as stated in 29 C.F.R. § 2510.3-3(c)(1) (Appendix, pp. 53a-55a), which is used only to clarify the definition of "employee benefit plan," to determine who can be a "participant" in an "employee benefit plan".[8] This Court held in *Darden* that the common-law definition of employee should be used to determine who can be an employee, and therefore, a participant in an employee benefit plan. The *Yates* holding directly conflicts with the holding in *Darden*. The holding in *Yates* will have a significant impact on entities owned by 100% shareholders, partners and sole proprietors by denying them the protections of ERISA and the Internal Revenue Code that are afforded to similar business owners in nine other circuits and all other employees participating in employee benefit plans. This is the exact "absurd result" that the DOL warned against. For these reasons, this Court should grant this Petition and review the holding of *Yates*.

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[8] 29 C.F.R. § 2510.3-3 (Appendix, pp. 53a-55a) is entitled "Employee Benefit Plan" and provides that "[t]his section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of title I of the Act and this chapter." *Id.* Nothing in this regulation indicates or implies that this regulation is to be relied upon to determine who can be a "participant" in an employee benefit plan.

CONCLUSION

There is a clear split of authority between the circuits over whether a sole owner and employee of a corporate employer, partner or a sole proprietor can be a participant in an employee benefit plan sponsored by that same employer. This question is likely to recur; therefore, this Petition should be granted in order to resolve the conflict between the circuits.

This issue is also an important question of federal law. As the ultimate expounder of federal law, this Court should grant this Petition in order to address the question presented herein.

For the foregoing reasons, Petitioners respectfully request that this Petition be granted and that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 00-6023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: RAYMOND B. YATES, Debtor. WILLIAM T. HENDON, Trustee, Plaintiff-Appellee,

v.

RAYMOND B. YATES, M.D.,P.C. Profit Sharing Plan; RAYMOND B. YATES, Trustee, Defendants-Appellants.

October 23, 2001, Argued

April 19, 2002, Decided

April 19, 2002, Filed

COUNSEL:
ARGUED: William S. Lockett, Jr., KENNERLY, MONTGOMERY & FINLEY, Knoxville, Tennessee, for Appellants.

Conrad M. Troutman, TROUTMAN & TROUTMAN, LaFollette, Tennessee, for Appellee.

ON BRIEF: James A. Holifield, Jr., KENNERLY, MONTGOMERY & FINLEY, Knoxville, Tennessee, for Appellants.

Conrad M. Troutman, TROUTMAN & TROUTMAN, LaFollette, Tennessee, for Appellee.

JUDGES:
Before: NELSON, CLAY, and GARWOOD, Circuit Judges.

OPINIONBY:
DAVID A. NELSON

OPINION:

DAVID A. NELSON, Circuit Judge. The question here is whether a Chapter 7 bankruptcy trustee was entitled to a court order setting aside as a voidable preference a loan repayment made by an insolvent debtor to his wholly-owned corporation's profit sharing/pension plan only three weeks before an involuntary bankruptcy petition was filed against the debtor. Both the bankruptcy court and the district court determined that the trustee in bankruptcy was entitled to have the repayment set aside, thereby increasing the amount of money available for creditors.

Pursuant to the Employee Retirement Income Security Act (ERISA), the profit sharing/pension plan contained a spendthrift clause providing that except for loans to participants, no interest available under the plan would be subject to voluntary or involuntary alienation or assignment. The plan and its trustee (the debtor wearing a fiduciary hat) contend that this restraint on alienation was enforceable under both ERISA (see *29 U.S.C. § § 1132*(a)(3) and (5)) and a Tennessee statute, Tenn. Code Ann. § 26-2-105(b). Therefore, argue the appellants, the money in question was not subject to recapture by the trustee in bankruptcy, given the Bankruptcy Code provision *(11 U.S.C. § 541*(c)(2)) that says a restraint on alienation of a debtor's beneficial interest in a trust is enforceable in a bankruptcy case if enforceable under applicable nonbankruptcy law.

We conclude that neither ERISA nor the Tennessee statute was applicable on the facts presented. Accordingly, we shall affirm the decision entered in favor of the trustee in bankruptcy.

I

The debtor, Dr. Raymond B. Yates, was the sole owner of a corporation known as Raymond B. Yates, M.D., P.C. The corporation maintained a profit sharing/pension plan that

was tax-qualified under *§ 401 of the Internal Revenue Code*. Dr. Yates was the plan's administrator and trustee. As of June 30, 1996, four people had been designated as participants in the plan. Dr. Yates was one of the four.

In December of 1989 Dr. Yates borrowed $ 20,000 from the plan at 11 percent interest. The loan was supposed to be repaid in monthly installments over a five year period, but Dr. Yates failed to make the monthly payments.

In June of 1992 the term of the loan was extended for five years. Still no monthly installments were paid. In mid-November of 1996, however, at a time when he must be presumed to have been insolvent (see *11 U.S.C. § 547*(f)), Dr. Yates used proceeds of a house sale to make payments to the plan in amounts totaling $ 50,467.46. This figure represented repayment of the loan in full, with accrued interest.

On December 2, 1996 - three weeks after the repayment - an involuntary bankruptcy petition was filed against Dr. Yates under Chapter 7, Title 11, of the United States Code. Eight months later the trustee in bankruptcy commenced an adversary proceeding against the plan and its trustee under *11 U.S.C. § § 547*(b) and 550. The complaint asked the court to (a) set the repayment aside as a preferential transfer and (b) order that the money be paid over to the bankruptcy trustee. It is undisputed that the $ 50,467.46 transfer made to the plan in November, 1996, qualified as a preference under *11 U.S.C. § 547*.

On cross-motions for summary judgment the bankruptcy court entered a judgment granting the relief sought in the bankruptcy trustee's complaint. The district court affirmed, and this appeal followed.

II

The Bankruptcy Code provides that, as a general rule, all property interests of a bankrupt debtor must be turned over to the trustee in bankruptcy for the benefit of creditors. *11 U.S.C. § 541*(a)(1). *Cf. In re Wilcox, 233 F.3d 899, 901 (6th Cir. 2000)*.

As we have seen, *11 U.S.C. § 541*(c)(2) carves out an exception to the general rule. Section 541(c)(2) reads as follows:

"A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

The Yates profit sharing/pension plan is a trust that contains a restriction on the transfer of participants' beneficial interests. The restriction, captioned "Spendthrift Clause," is couched in the following terms:

"Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, *no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily.* The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be a qualified domestic relations order, as defined in Section 414(p) of the Code, or any domestic relations order entered before January 1, 1985." (Emphasis supplied.)

Is this spendthrift clause "enforceable under applicable nonbankruptcy law" within the meaning of that phrase as used in *11 U.S.C. § 541*(c)(2)? If it is, the courts below erred in requiring that the money Dr. Yates put into the plan on the eve of his bankruptcy be assigned to the bankruptcy trustee for the benefit of Dr. Yates' creditors. If the clause is not enforceable under applicable nonbankruptcy law, however, the courts below did not err in holding that the trustee in bankruptcy was entitled to the money.

Dr. Yates cites two separate bodies of nonbankrtupcy law that are, in his submission, applicable: ERISA and the Tennessee Code. We consider each in turn.

A

ERISA contains a provision stating that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *29 U.S.C. § 1056*(d)(1). This provision "clearly imposes a 'restriction on the transfer' of a debtor's 'beneficial interest' in the trust." *Patterson v. Shumate, 504 U.S. 753, 759, 119 L. Ed. 2d 519, 112 S. Ct. 2242 (1992).* The Yates plan contained a restriction of the sort prescribed, and one might suppose that Dr. Yates would be entitled to bring a civil action under ERISA to enforce its terms. See *29 U.S.C. § 1132*(a)(3)(B)(ii), which provides that "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan."

If one supposed that Dr. Yates could obtain judicial enforcement of the terms of the plan under ERISA in the Sixth Circuit, however, one would be wrong. Our published caselaw teaches that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 186 (6th Cir. 1992).* As an "employer," a sole shareholder cannot qualify as a "participant or beneficiary" in an ERISA pension plan. *Id.*; *Agrawal v. Paul Revere Life Ins. Co., 205 F.3d 297 (6th Cir. 2000).* The sole shareholder "is not an ERISA entity," in other words, and "does not have standing under the ERISA enforcement mechanisms." *Agrawal, 205 F.3d at 302.*

In their opening brief on appeal, the appellants argue that the *Fugarino* decision departs from a plain reading of ERISA, conflicts with advisory opinions of the Department of Labor, and is contradicted by the caselaw of eight other circuits. But these arguments belong in a petition for rehearing en banc; the three judge panel before which this appeal is currently pending has no authority to overrule *Fugarino*. See 6th Cir. R. 206(c), which reads as follows:

"Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a

previous panel. Court en banc consideration is required to overrule a published opinion of the court."

To the same effect see *Valentine v. Francis, 270 F.3d 1032, 1035 (6th Cir. 2001); United States v. Dunlap, 209 F.3d 472, 481 (6th Cir. 2000); United States v. Washington, 127 F.3d 510, 516-17 (6th Cir. 1997);* and *United States v. Smith, 73 F.3d 1414, 1418 (6th Cir. 1996).*

Finally, the appellants argue that *Fugarino* was overruled by the Health Insurance Portability and Accounting Act of 1996, which enacted *29 U.S.C. § 1191a.* That section, captioned "Special rules relating to group health plans," provides among other things that "in the case of a group health plan, the term 'participant' also includes . . . [a] self employed individual, if such individual is, or may become, eligible to receive a benefit under the plan . . . ." *29 U.S.C. § 1191a*(d)(3).

The appellants' § 1191a(d)(3) argument has at least two obvious flaws:

(1)The Yates profit sharing plan is not a group health plan, and

(2)the published decision in *Agrawal* - which is no less binding on this panel than the published opinion in *Fugarino* - was issued some three and a half years after the enactment of § 1191a(d)(3). And see *Securities and Exchange Commission v. Johnston, 143 F.3d 260, 262 (6th Cir. 1998),* a post-1996 decision accepting the argument that "ERISA does not apply to any [profit sharing/pension] plan to the extent it benefits the sole owner of a business and his or her spouse."

Under circuit precedent by which this panel is bound, in short, it is clear that the spendthrift clause in the Yates profit sharing/pension plan is not enforceable by Dr. Yates under ERISA.

B

Neither is the spendthrift clause enforceable under Tennessee statutory law. The Tennessee Personal Property Owner's Rights and Garnishment Act of 1978, on which the appellants rely, contains a section providing (subject to an exception not relevant here) as follows:

"any funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under § § 401(a), 403(a), 403(b), 408 and *408A of the Internal Revenue Code* of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee. All records of the debtor concerning such plan and of the plan concerning the debtor's participation in the plan, or interest in the plan, are exempt from the subpoena process." Tenn. Code Ann. § 26-2-105(b). (Prior to 2000, this section was codified at Tenn. Code Ann. § 26-2-104(b).)

By its terms, this is an exemption statute; that is, it purports to make property exempt from the claims of creditors. The statute contains no direct reference to any retirement plan language imposing a restriction on the transfer of a beneficial interest in the plan, and it does not purport to make any provision of the plan enforceable as such. Like the Pennsylvania exemption statute considered by the court in *In re Lowenschuss, 171 F.3d 673 (9th Cir. 1999),* the Tennessee exemption statute "operates without regard to a transfer restriction that may be contained in the trust instrument." *Id. at 682.*

Nonbankruptcy law that does not purport to provide for the enforcement of a restriction contained in the trust instrument is not the sort of nonbankruptcy law of which the Bankruptcy Code speaks in *11 U.S.C. § 541*(c)(2). The text of § 541(c)(2) is notable for its "clarity," see *Patterson v. Shumate, 504 U.S. at 760,* and "we must enforce the statute according to its terms." *Id. at 759.* The appellants would have us go well beyond the literal terms of § 541(c)(2); this we decline to do.

We readily acknowledge that caselaw from two of our sister circuits, the Third and the Eleventh, suggests that those circuits would make the opposite call here. See *In re Yuhas, 104 F.3d 612, 614 (3d Cir. 1997)*, and *In re Meehan, 102 F.3d 1209, 1211-12 (11th Cir. 1997)*. With respect, however, it seems to us, for reasons already suggested, that we would be usurping a legislative role were we to read § 541(c)(2) as meaning anything other than what it plainly says.

The power to claim an exemption, after all, is personal to the debtor. See *In re Noblit, 72 F.3d 757, 758 (9th Cir. 1995)*, *In re Everhart, 11 B.R. 770, 772 (N.D. Ohio 1981)*, and *In re Sanders, 213 B.R. 324, 329 (M.D. Tenn. 1997)*. As debtor, Dr. Yates has not claimed the exemption. Dr. Yates as trustee of the plan would like to claim an exemption on behalf of Dr. Yates as beneficiary/debtor, but he is not entitled to do so. See *In re Ross, 18 B.R. 364 (N.D. N.Y. 1982)*.

The appellants have not argued that the spendthrift clause in the Yates plan is enforceable at common law or in equity, under Tennessee jurisprudence, so it is not incumbent on us to opine on that question.

AFFIRMED.

Footnotes

Fn1 The Honorable Will L. Garwood, United States Circuit Judge for the Fifth Circuit, sitting by designation.

No. 3:99-CV-600
Judge Curtis L. Collier

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff-Appellee,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, Trustee,
Defendants-Appellants.

Filed June 26, 2000

MEMORANDUM

This case is before the Court on appeal from the United States Bankruptcy Court for the Eastern District of Tennessee. Defendants-Appellants Raymond B. Yates, M.D., P.C., Profit Sharing Plan and Raymond B. Yates, Trustee, appeal the Bankruptcy Court's grant of summary judgment to Plaintiff-Appellant William T. Hendon, Trustee (Rec. 15). For the reasons stated below, the Court will AFFIRM the decision of the Bankruptcy Court.

I. STANDARD OF REVIEW

Jurisdiction to hear appeals from bankruptcy court is conferred by 28 U.S.C. § 158. In determining appeals from bankruptcy court, this Court sits as an appellate court, reviewing the bankruptcy court's findings of fact under a

clearly erroneous standard, but conducting a de novo review of the bankruptcy court's conclusions of law. Fed. R. Bankr. P. 8013; In re Baker and Getty Financial Services, Inc., 106 F.3d 1255, 1259 (6th Cir. 1997); Harbor Lights Marina v. Wandstrat, 153 B.R. 781 (Bankr. S.D. Ohio 1993). However, the Court may overturn matters within the discretion of the bankruptcy court only for an abuse of discretion. Fed. R. Bankr. P. 8003; American Imaging Services, Inc. v. Eagle-Picher Industries, Inc. (In re Eagle-Picher Industries, Inc.), 963 F.2d 855, 858 (6th Cir. 1992); accord Investors Credit Corp. v. Batie, 995 F.2d 85, 88 (6th Cir. 1993).

II. FACTUAL BACKGROUND

Raymond B. Yates, M.D., P.C. is a professional corporation (the "Corporation"), wholly owned by Debtor Raymond B. Yates ("Dr. Yates"). On July 20,1989, the Corporation created the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the "Plan"), by executing an Adoption Agreement. fn1 Dr. Yates signed the Adoption Agreement in his capacity as president of the Defendant-Appellant Corporation, and in his capacity as trustee of the Defendant-Appellant Plan. By letter dated May 10, 1990, the Internal Revenue Service informed Dr. Yates in his capacities as administrator and trustee the Plan was "acceptable under § 401 of the Internal Revenue Code for use by employers for the benefit of employees" (Rec. 7, Exh. B). fn2

In addition to being the sole owner of the corporation, and the administrator and trustee of the Plan, Dr. Yates participated in the Plan as an employee. From the time of its inception, the Plan always had at least one additional participant, who was not related to Dr. Yates. As of June 30, 1996, in addition to Dr. Yates, there were three participants in the Plan. None of the other three participant employees was related to Dr. Yates.

In his capacity as an employee participant in the Plan, Dr. Yates borrowed against his interest in the Plan under the "Model Loan Program" which was incorporated into the Plan

by the Adoption Agreement. fn3 On December 13, 1989, Dr. Yates executed a Promissory Note in the principal amount of $20,000.00 (Rec. 7, Exh. C). fn4 The terms of the loan provided for an eleven percent rate of interest until default and a five-year repayment period, which was extended for another five years on June 12, 1992 (Rec. 13). On December 13, 1989, Dr. Yates also executed an Irrevocable Pledge and Assignment to secure the indebtedness to be repaid under the Promissory Note (Rec. 7, Exh. C). In the Irrevocable Pledge and Assignment, Dr. Yates pledged and assigned to the trustee of the Plan "the Vested Employer Account Balance, at any time existing under the Plan, necessary to satisfy the loan which is the subject of this pledge, any unpaid interest on such loan, all attorneys' fees [sic] necessary for collection of this obligation and all costs of collection" (Rec. 7, Exh. C).

Although the terms of the loan required Dr. Yates to make monthly payments in the amount of $433.85 (Rec. 13), Dr. Yates failed to make regular payments on the Promissory Note and it remained outstanding until November 1996. in that month he paid off the entire debt by making two payments to the Plan. On November 12, 1996 he paid $38,000.00 and on November 13, 1996, he paid $12,467.46. Together, the payments totaled $50,467.46 and represented the amount of principal and interest due under the Promissory Note. Dr. Yates used the proceeds from the October 1996 sale of his home to make the repayments. After these repayments, Dr. Yates's interest in the Plan was approximately $87,000 (Rec. 14, at 5).

Article 18.02 of the Basic Plan Document #01, which forms an integral part of the Plan, is a "spendthrift clause" which provides as follows:

Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily. The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable

with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be a qualified domestic relations order, as defined in § 414(p) of the Code, or any domestic relations order entered before January 1, 1985.

(Rec. 7, Exh. A, at 18-1.)

On December 2, 1996, an involuntary petition under Chapter 7, Title 11 of the United States

Code (the Bankruptcy Code) was filed against Dr. Yates. Dr. Yates claimed an $89,000 interest in the Plan as exempt property on Schedule C of his bankruptcy schedules (Rec. 8, attach.). He claimed this exemption under Tenn. Code Ann. § 26-2-104(b), which states:

[A]ny funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 401(b), and 408 of the federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee.

Tenn. Code Ann. § 26-2-104(b).

On August 5, 1998 the Bankruptcy Trustee filed an adversary proceeding against the Plan and Dr. Yates, as the Plan's trustee, seeking to avoid the $50,467.46 in loan repayments Dr. Yates had made to the Plan in November of 1996, less than 90 days prior to filing of the bankruptcy petition. The Bankruptcy Trustee asserted that Dr. Yates was insolvent at the time of the transfer, that the transfer enabled the Plan, as a creditor, to receive more than it would receive under the Bankruptcy Code had the transfer not been made, and that the repayments were therefore avoidable transfers under 11 U.S.C. § 547(b) (Rec. 1). fn5 The Plan and Dr. Yates in his capacity as trustee asserted the Trustee could not recover the repayments because the money the Trustee sought to recover

represented part of Dr. Yates's interest in a qualified retirement plan and was excluded from his bankruptcy estate (Rec. 2).

The parties to the adversary proceeding filed cross motions for summary judgment. The Bankruptcy Court issued a Memorandum on Cross Motions for Summary Judgment on September 2, 1999, granting the Chapter 7 Trustee's motion and denying the Defendants' motion. The Bankruptcy Court ruled the Trustee had established all of the elements required by 11 U.S.C. § 547(b) concerning the avoidability of a preferential transfer. Dr. Yates's interest in the Plan was not qualified under the Employee Retirement Income Security Act of 1974,29 U.S.C. §§ 1001, et seq. ("ERISA"), and no provisions of either ERISA or State law barred the Trustee from recovering the loan repayments made by Dr. Yates to the Plan. Since Dr. Yates's interest in the pension plan was a part of the bankruptcy estate, the Trustee could avoid the November 1996 repayments and recover the $50,467.46 from the Plan (Rec. 14). Judgment entered September 2, 1999, ordering avoidance of the $50,467.46 (Rec. 15).

On appeal Appellants raise four issues:

A. Whether the Bankruptcy Court erred in concluding the Defendant-Appellant Plan is not ERISA-qualified.

B. Whether the Bankruptcy Court erred in concluding Dr. Yates cannot be a participant in the Defendant-Appellant Plan, and that Dr. Yates is ineligible to benefit from the protections of ERISA.

C. Whether the Bankruptcy Court erred in concluding the Chapter 7 Trustee may recover from the Plan under 11 U.S.C. § 550, avoidable transfers made by Dr. Yates, in light of an ERISA restriction on alienation of Dr. Yates's interest in the plan.

D. Whether the Bankruptcy Court erred in concluding the Chapter 7 Trustee may recover from the Plan under 11

U.S.C. § 550, avoidable transfers made by Dr. Yates, in light of a restriction on alienation of Dr. Yates's interest in the Plan set forth in Tennessee Code Annotated § 26-2-104(b).

III. DISCUSSION

A. Whether the Plan is ERISA-qualified

The Plan and Dr. Yates in his capacity as trustee contend the Bankruptcy Court found the Plan is not ERISA-qualified. Neither party had raised as an issue the question of whether the Plan was ERISA-qualified. In fact, both parties agreed the Plan was ERISA-qualified. Appellants further contend the issue of whether the Plan is ERISA-qualified is one of material fact. Summary Judgment can be granted only when there are no material issues of fact in dispute. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Thus, Appellants argue, Summary Judgment was inappropriate.

Upon review of the Bankruptcy Court's decision, the Court concludes the Bankruptcy Court did not make such a broad holding. The Bankruptcy Court simply found Dr. Yates's particular interest in the Plan did not allow him to assert the protections available under ERISA.

On page thirteen of its Memorandum the Bankruptcy Court states, "the Debtor's interest is not a spendthrift trust or an ERISA-qualified plan." Earlier in the Memorandum the Bankruptcy Court found Dr. Yates could not participate in the Plan as an employee under ERISA (Rec. 14, at 10). The court's statement that Dr. Yates's interest is not an ERISA-qualified plan is no more than a necessary conclusion from its earlier finding that Dr. Yates cannot participate as an employee under ERISA. While the Plan may be ERISA-qualified as to other participants, the court found it is not ERISA-qualified as to Dr. Yates. Dr. Yates may have been participating in the Plan, but his participation in the Plan was not under ERISA. fn6

In summary, the Bankruptcy Court did not find the Plan as a whole was not ERISA-qualified, as the Plan and Dr. Yates in his capacity as trustee assert. The Bankruptcy Court found, because Dr. Yates could not participate in an ERISA-qualified plan, the Plan was not ERISA-qualified as to him. The issue of whether Dr. Yates is qualified to participate under ERISA is one of law, not of fact.

B. Whether Dr. Yates can participate in the Plan and benefit from the protections of ERISA

The Bankruptcy Court was correct in holding, (1) under the governing case law of the United States Court of Appeals for the Sixth Circuit, Dr. Yates was not qualified to participate in the Plan under ERISA, and (2) Dr. Yates was therefore ineligible to benefit from the protections of ERISA.

Crucial to an understanding of Appellants' assertion Dr. Yates could participate in the Plan under ERISA, and to the Bankruptcy Court's conclusion he could not, is an understanding of how ERISA defines certain terms. In fact, the issue the Plan and Dr. Yates in his capacity as trustee raise is essentially decided by definition. Appellants interpret ERISA to permit an employer to be an employee for certain purposes. The Bankruptcy Court held employers and employees are two inalterably distinct categories, for purposes of ERISA-qualified pension plans.

Title 29 U.S.C. § 1002 defines terms used in ERISA. It defines "employee pension benefit plan" as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or
(ii) results in a deferral of income by employees for periods extending to the termination of covered employment

or beyond,

29 U.S.C. § 1002(2)(A).

Section 1002(6) defines "employee" as "any individual employed by an employer." Section 1002(7) defines "participant" as "any employee or former employee of an employer. . . who is or may become eligible to receive a benefit of any type from an employee benefit plan. . ."

Title 29 of the Code of Federal Regulations § 25 10.3-3(b), an ERISA regulation, provides in part, ". . . the term 'employee benefit plan' shall not include any plan, fund or program,. . . under which no employees are participants covered under the plan. . . ." 29 C.F.R. § 2510.3-3(b).

Title 29 of the Code of Federal Regulations § 2510.3-3(c)(1), also referencing ERISA, provides, "An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse " 29 C.F.R. § 2510.3-3(c)(1).

The Bankruptcy Court held Dr. Yates was not qualified to participate in the Plan under ERISA. Pursuant to Sixth Circuit holdings in SEC v. Johnston, 143 F.3d 260 (6th Cir. 1998); Fugarino v. Hartford Life and Accident Insurance Co., 969 F.2d 178 (6th Cir. 1992); and Lowenschuss v. Selnick, 171 F.3d 673 (9th Cir. 1999), the court ruled an employer cannot be an employee or a participant under ERISA (Rec. 14, at 9). Finding these cases to hold self-employed sole owners of businesses are excluded from participating under ERISA in plans they sponsor, and noting Dr. Yates was a self-employed, sole owner sponsor of a pension plan, the court held Dr. Yates was likewise disqualified from participating as an employee in an ERISA-qualified plan (Rec. 14, at 10).

The Plan and Dr. Yates in his capacity as trustee attempt to distinguish this case from Johnston, Fugarino, and

Lowenschuss. In Johnston the Sixth Circuit stated: "ERISA does not apply to any plan to the extent it benefits the sole owner of a business and his or her spouse." 143 F.3d at 262 (quoting from the appellant Securities and Exchange Commission's challenge to the district court's holding). As Appellants observe, Johnston dealt with a plan that covered only the sole owner employer and his wife. Id. Thus, Johnston's plan was not created for the benefit of employees other than the sole owner. In contrast, Dr. Yates established a plan that at all times covered at least one other employee who was not a family member (Court File No. 2, at 10-12). While the Plan and Dr. Yates in his capacity as trustee are correct as to this distinction between Johnston's and Dr. Yates's plans, Johnston still applies to this case, for reasons to be discussed below.

In Fugarino the Sixth Circuit held "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." 969 F.2d at 186. The plaintiff in Fugarino was the sole proprietor of a restaurant, who purchased group health insurance coverage for himself, his dependants, and a few employees and their dependants. Id. at 181. The court held Fugarino had established and maintained an employee welfare benefit plan regulated by ERISA as to his employees and their dependants. However, as to Fugarino and his dependants, the Court concluded the group health insurance policy was not an ERISA plan and only constituted an insurance contract governed by State law. Fugarino could not qualify under ERISA as a participant in the plan because of the provision of 29 C.F.R. § 2510.3-3(c)(1) stipulating that a sole owner of a business shall not be deemed to be an employee with respect to the business. Id. at 185-86.

When discussing Fugarino, the Plan and Dr. Yates in his capacity as trustee contend Fugarino has been legislatively overruled by ERISA § 732(d)(3) [29 U.S.C. § 1191 a]; fn7 (2) Fugarino applies to sole proprietorships, not to solely owned corporations; (3) the Sixth Circuit erred Fugarino by failing to read the applicable regulation, 29 CFR § 251 0.3-3(c)(1) in its

totality (Court File No. 2, at 11- 13.) Johnston provides an immediate answer to the first two contentions.

As to Appellants' first contention, Johnston found the logic in Fugarino controlling, in spite of the fact that Johnston was decided in 1998, after the 1996 amendment at ERISA § 732(d)(3), which Appellants refer, and in spite of the fact Johnston pertained to a pension plan and Fugarino pertained to a health insurance plan. Johnston, 143 F.3d at 262. The Johnston court declared:

It is true that the plan at issue in Fugarino is a welfare plan, as opposed to the pension plan at issue in this case, but the Fugarino court referred generically to "a plan" in discussing ERISA qualification. 969 F.2d at 185. The Fugarino court also cited 29 C.F.R. § 25 10.3-3, which applies to both welfare and pension plans. Id. We hold that the principle enunciated in Fugarino applies to pension and welfare plans.

Id.

Section 732(d) is specifically directed toward coverage under group health plans. A change in ERISA's treatment of business owners in regard to participation in group health plans would not affect ERISA's treatment of business owners in regard to participation in pension plans. And, as already noted, Johnston was decided after the amendment. If the Johnston court had believed the amendment had implications for pension plans, it would have said so.

As to Appellants' second contention, that Fugarino applies to sole proprietorships and not to solely owned corporations, Johnston found Fugarino controlling, in spite of the fact Fugarino pertained to a sole proprietor, Fugarino, 969 F.2d at 180, while Johnston pertained to the sole owner of a corporation, Johnston, 143 F.3d at 261. The Sixth Circuit did not distinguish between a sole proprietor and the sole owner of a corporation for purposes of determining whether the sole owner of a business entity can participate as an employee under ERISA. See also Agrawal v. Paul Revere Life

Ins. Co., 205 F.3d 297 (6th Cir. 2000) (discussed infra, applying Fugarino to the sole owner of a corporation).

Appellants' third contention is the Fugarino court misread 29 C.F.R. § 2510.3-3(c)(1). Appellants argue a complete reading of the regulation would have led the court to realize § 25 10.3-3(c)(l) applies only to the question of whether an ERISA-qualified plan exists, and not at all to the question of whether an employer can participate in an ERISA-qualified plan as an employee. In other words, § 2510.3-3(c)(1) should be read to mean a plan that includes only an employer and his or her spouse cannot be an ERISA-qualified plan. Such a reading does not preclude the possibility that, once an ERISA-qualified plan exists (that is, one in which employees other than the employer are participating), then the employer may join as an additional employee (Rec. 2, at 13-15).

As to the contention the Sixth Circuit misread or misunderstood the import of 29 C.F.R. § 2510.3-3(c)(1), this Court, and all lower courts, are bound to apply the regulation in the same manner as the Sixth Circuit applied the regulation. See Beverly Enterprises v. NLRB, 727 F.2d 591, 593 (6th Cir. 1984). Appellants cite to Madonia v. Blue Cross & Blue Shield of Virginia, 11 F.3d 444, 449 (4th Cir. 1995) and Vega v. Nat Life Ins. Services, Inc., 188 F.3d 287 (5th Cir. 1999) in support of the position that, while a sole owner cannot create an ERISA-qualified plan if he or she is to be the sole participant in the plan, the sole owner may create a plan for the benefit of other employees, and then personally participate in the plan as an employee (Rec. 2, at 17-21). While the reasoning contained in Madonia and Vega may be compelling, it is not the law in the Sixth Circuit.

Fugarino has particular application to the instant case, because Fugarino dealt specifically with a plan that was ERISA-qualified for Fugarino's employees, but not ERJSA-qualified for sole owner Fugarino. 969 F.2d at 185. Given that Johnston held Fugarino applied to sole owners of corporations and to pension plans, Johnston, 143 F.3d at 262, Fugarino's complete applicability to the instant case is clear.

fn8

The Bankruptcy Court further held, because Dr. Yates was not a qualified participant in the plan under ERISA, he was not eligible for the protections afforded by ERISA (Rec. 14, at 10). The Sixth Circuit's recent decision of Agrawal v. Paul Revere Life Insurance Co., 205 F.3d 297 (6th Cir. 2000), decided since the Bankruptcy Court's ruling, applies to, and supports the determination made by the Bankruptcy Court. Agrawal was the sole owner of a corporation that carried three disability policies. Id. at 298. One of the policies covered both Agrawal and other employees and was ERISA-qualified as to the other employees. At issue was a separate policy, of which Agrawal was the sole beneficiary. Id. at 298. The Court of Appeals ruled:

The district court erred in ignoring Fugarino. Because Dr. Agrawal is the sole shareholder of Agrawal, Inc., he is neither a participant nor a beneficiary under an ERISA plan. See id. [citing Fugarino at 186.] As neither a participant nor a beneficiary, Dr. Agrawal is not an ERISA entity; likewise, he does not have standing under the ERISA enforcement mechanisms. See Smith, 170 F.3d at 616-17 [citing Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999)]. Because Congress did not intend to create an enforcement mechanism to bind non-ERISA parties, we hold that Dr. Agrawal does not have standing to enforce his rights under ERISA.

Id. at 302.

The fact Dr. Yates was not qualified to participate in an ERISA protected plan means none of the money he contributed to the Plan as an "employee" was ever a part of an ERISA plan. The $50,467.46 he returned to the Plan was not protected by ERISA, because none of the money he had in the Plan was protected by ERISA. fn9

Reading ERISA independently, the Agrawal panel was not completely comfortable with Fugarino's conclusions. Id. at 302. Nonetheless, the panel was bound to apply Fugarino to

the case before it. See US. v. Dunlap, 209 F.3d 472, 480 (6th Cir. 2000). This Court is equally bound. See Beverly Enterprises, 727 F.2d at 593.

C. Whether Dr. Yates's loan repayments to the Plan are excluded from the bankruptcy estate under ERISA

The success of Appellants' argument that Dr. Yates's loan repayments are excluded from the bankruptcy estate is contingent upon acceptance of their earlier argument that Dr. Yates was a qualified participant in an ERISA-qualified plan. Both this Court and the Bankruptcy Court held Dr. Yates was not participating in a plan that was ERISA-qualified as to him. Because the Plan was not ERISA-qualified as to Dr. Yates, he could receive none of the protections of ERISA, Agrawal, 205 F.3d at 302, and his interest in the Plan was not excluded from the bankruptcy estate by virtue of its being part of an ERISA-qualified plan. The Bankruptcy Court did not resolve the question of whether the bankruptcy Trustee had the power to recover a preference from property that was excluded from the estate, because the Bankruptcy Court ruled the $50,467.46 was not excluded from the estate, either under ERISA or under State law (Rec. 14, at 12-14).

The Bankruptcy Court was correct in concluding, since Dr. Yates did not borrow from an ERISA-qualified plan, the loan repayments he made did not go into an ERISA-qualified plan. Were it not for Appellants' conflating their argument on this third issue (Rec. 2, at 22-23) with their reasoning in the previous issue (Rec. 2, at 8-21), the Court would devote no further attention to it. However, because Appellants appear to be using the Supreme Court's rulings in Patterson v. Shumate, 504 U.S. 753 (1992), and Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990) to bolster their earlier argument that Dr. Yates was a qualified participant in an ERISA-qualified plan, the Court will review Appellants' argument more thoroughly.

Title 11 U.S.C. § 541(a) provides:

The commencement of a case under section 301, 302, or 303 of this title creates an estate Such estate is comprised of all the following property, wherever located and by whomever held

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case . . .

11 U.S.C. § 541(a)(l). In other words, with the few exceptions provided in subsections (b) and (c)(2) of the statute, all property of the debtor enters the bankruptcy estate.

Section 541(c)(2) provides the following exception to § 541(a)(l):

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C § 541(c)(2). In other words, a debtor's interest in a pension plan would be excluded from the bankruptcy estate if the plan contained a transfer restriction enforceable under nonbankruptcy law.

Had Appellants been able to establish Dr. Yates's interest in the Plan was ERISA-qualified, they might have shown the interest was excluded from the bankruptcy estate under "nonbankruptcy law," that is, under ERISA's antialienation provision. Fn10 Given the rulings of the Supreme Court in Shumate and Guidry, had Dr. Yates been eligible to participate in the Plan under ERISA, the Chapter 7 Trustee might have been prohibited from avoiding Dr. Yates's loan repayments to the Plan. However, because Dr. Yates was not a qualified participant, the ERISA restriction on alienation is inapplicable to him.

The Plan and Dr. Yates in his capacity as trustee rely on Shumate and Guidry to support their position a bankruptcy trustee cannot recover an otherwise avoidable preference

from an ERISA protected pension plan. The Shumate Court noted:

Section 541 (c)(2) provides the following exclusion from the otherwise broad definition of "property of the estate" contained in § 541 (a)(1) of the Code:

"A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non bankruptcy law is enforceable in a case under this title."

The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant non bankruptcy law.

Shumate, 504 U.S. at 757-58.

The Shumate Court went on to hold the ERISA-required antialienation provision in a pension plan constitutes an enforceable transfer restriction for purposes of 11 U.S.C. § 541(c)(2)'s exclusion of property from the bankruptcy estate. Id. At 760.

In Guidry, the Supreme Court prohibited a district court from imposing a constructive trust on an ERISA qualified pension plan for the purpose of assuring a union official would repay money he had embezzled from the union. 493 U.S. at 367, 372. The Court held a constructive trust violated the antialienation provisions of ERISA. Id. at 37 1-72. In finding the ERISA antialienation provisions protect ERISA-qualified plans from judgment collections, the Supreme Court concluded:

Nor do we think it appropriate to approve any generalized equitable exception–either for employee malfeasance or for criminal misconduct–to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless)

even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
Id. at 376.

The Plan and Dr. Yates in his capacity as trustee rely on Shumate to show § 541(c)(2)'s exclusion of certain property from a bankruptcy estate applies to ERISA protected pension plans. Shumate does indeed say this. But Shumate does not say anything about whether a sole shareholder in a business can participate in an ERISA-qualified plan. Under current Sixth Circuit law, as articulated in Agrawal, Johnston, and Fugarino, he cannot. Since Dr. Yates's contributions were not protected by ERISA, Shumate does not apply.

The Plan and Dr. Yates in his capacity as trustee rely on Guidry to show that any funds placed in an ERISA protected plan are protected from alienation, regardless of the nature of those funds prior to their addition to the plan. Guidry would support an argument preferential transfers are safe from avoidance once they enter an ERISA plan. But Guidry does not say what constitutes an ERISA plan. Based upon Sixth Circuit precedent found in Agrawal, Johnston, and Fugarino, Dr. Yates was not participating in a plan under any ERISA protections. Guidry is inapplicable to this case.

In their Reply Brief Appellants also rely on Loomer v. Becton, Dickinson and Co., 198 B.R. 755 (Bankr. D. Neb. 1996) (Court File No. 7, at 10). In that case a bankruptcy court held a bankruptcy trustee cannot recover loan repayments that are preferential transfers from a qualified ERISA plan. id. at 758. However, Loomer, a bankruptcy court level decision from another circuit, deals with a debtor whose qualifications to participate in an ERISA protected plan were undisputed: "The Trustee does not assert that the debtor's Contributions and Loan Repayments were not permitted under the Plan. Thus, once the Contributions were deposited into the Trust Fund, they gained the protection of the alienation restraint." Id. at 762. Dr. Yates's interest in the Plan was of an entirely different nature: it was not part of an ERISA qualified plan.

Loomer is inapplicable to this case.

In short, although Appellants have made a good argument that once otherwise avoidable loan repayments enter an ERISA qualified plan, they become untouchable by bankruptcy avoidance procedures, Appellants have failed to establish the Bankruptcy Court erred in concluding Dr. Yates's interest in the Plan was not protected by ERISA. Since Dr. Yates was not participating in an ERISA-qualified plan, he could not be protected by ERISA's antialienation provision.

D. Whether Dr. Yates's repayments to the Plan are excluded from the bankruptcy estate under Tennessee Code Annotated § 26-2-104(b)

The Bankruptcy Court correctly held the restriction on alienation provision of the Plan cannot be enforced under Tenn. Code Ann. § 26-2-104(b). Consequently, the Tennessee exemption statute cannot be applied to exclude Dr. Yates's interest in the Plan from the bankruptcy estate under 11 U.S.C. § 541(c)(2). fn11

As the Court previously noted, 11 U.S.C. § 54 1(a) provides a bankruptcy estate includes all legal or equitable interest of the debtor in property as of the commencement of the bankruptcy estate. Section 541(c)(2) provides for the exception of"[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law." Tenn. Code Ann. §26-1-104(b), the Tennessee statute which exempts from creditor claims certain pension plan finds, provides:

[A]ny finds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§401(a), 401(b), and 408 of the federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee.

Tenn. Code Ann. § 26-2-104(b).

In their final argument, the Plan and Dr. Yates in his capacity as trustee urged the Bankruptcy

Court to rule Tennessee law precluded the Chapter 7 Trustee from recovering the $50,467.46 preference. They argued the Tennessee exemption statute constituted "[a] restriction on the transfer of a beneficial interest of the debtor in a trust" under 11 U.S.C. § 541(c)(2). Instead, the Bankruptcy Court found neither the repayments nor the rest of Dr. Yates's interest in the Plan was excluded from the bankruptcy estate (Rec. 14, at 12-14). In reaching this conclusion, the Bankruptcy Court relied heavily on the United States Court of Appeals for the Ninth Circuit's decision in Lowenschuss, 171 F.3d at 673.

The Ninth Circuit in Lowenschuss ruled a debtor could not use a Pennsylvania exemption statute to exclude his interest in a pension plan from the bankruptcy estate under 11 U.S.C. §541(c)(2) and Shumate. According to the Lowenschuss court, for an exemption statute to have the effect of excluding a debtor's interest in a pension plan from a bankruptcy estate, the statute must contain a provision which enforces the transfer restriction contained in the plan. Id at 681. The Lowenschuss court examined the Pennsylvania statute on which the pension plan trustee hoped to rely, and concluded the statute lacked the requisite enforcement provision. While ERISA enforces transfer restrictions by providing civil remedies to participants, the Pennsylvania statute contained no means for a debtor to enforce a pension plan's transfer restrictions. Id. at 682.

In Patterson [Shumate], the Supreme Court held that the transfer restriction required in every ERISA plan was enforceable because ERISA-plan participants or beneficiaries could enforce that transfer restriction through ERISA's civil remedies. . . . in contrast, § 8 124(b) [of the Pennsylvania Consolidated Statutes]does not provide a mechanism by which Debtor can enforce the transfer restriction contained

in the Pension Plan. In fact, the § 8124(b) exemption operates without regard to a transfer restriction that may be contained in the trust instrument. Therefore, Debtor's interest in the Pension Plan cannot be excluded from the bankruptcy estate under § 8124(b).

Id. at 682.

The Plan and Dr. Yates in his capacity as trustee rely on In re Yuhas, 104 F.3d 612 (3d Cir. 1997) and In re Meehan, 102 F.3d 1209 (11th Cir. 1997) to support their position the Tennessee exemption statute enforces the antialienation provision of the Plan. The Third Circuit in Yuhas concluded a New Jersey statute constituted a nonbankruptcy law containing an enforceable transfer restriction. 104 F.3d at 613. That statute read:

Notwithstanding the provisions of any other law to the contrary, any property held in a qualifying trust and any distributions from a qualifying trust, regardless of the distribution plan elected for the qualifying trust, shall be exempt from all claims of creditors and shall be excluded from the estate in bankruptcy.

For purposes of this section, a "qualifying trust" means a trust created or qualified and maintained pursuant to federal law, including, but not limited to, section. . . 408 of the federal Internal Revenue Code of 1986 (26 U.S.C. § . . .408...).

N.J Stat. Ann. § 25:2-1(b).

The United States Court of Appeals for the Eleventh Circuit in Meehan likewise concluded the relevant State law contained an enforcement provision. 102 F.3d at 1210. That Georgia statute read:

Funds or benefits from an individual retirement account as defined in § 408 of the United States Internal Revenue Code of 1983, as amended, [are] exempt from the process of garnishment until paid or otherwise transferred to a member

of such program or beneficiary thereof

Ga. Code Ann. § 18-4-22(a).

The Pennsylvania statute which the Ninth Circuit in Lowenschuss read to contain no enforcement provision provided for the exemption "from attachment or execution on any judgment .[a]ny retirement or annuity fund provided for under section 40 1(a), 403(a) and (b), 408 or 409 of the Internal Revenue Code. . . , the appreciation thereon, the income therefrom and the benefits or annuity payable thereunder." 42 Pa. Cons. Stat. § 8124(b)(1)(ix). 171 F.3d at 682. fn12

The Third, Ninth, and Eleventh Circuits came to different conclusions regarding the enforceability of State statutes not because the statutes were so different, but because the Courts of Appeals differed in how they dealt with the question of what constitutes an enforceable restriction. The Eleventh Circuit in Meehan focused on whether the restriction had to be contained in the plan, as opposed to being located in the statute, and concluded location in the plan itself was not required. 102 F.2d at 1212. The Third Circuit in Yuhas focused on what constitutes a "restriction," and concluded the New Jersey statute contains a restriction for purposes of 11 U.S.C. § 541(c)(2). 104 F.3 d at 614-15. Only the Ninth Circuit in Lowenschuss focused on what makes a restriction "enforceable" for purposes of 11 U.S.C. § 54l(c)(2). 171 F.3d at 682-84. fn13

The reasoning in Lowenschuss is persuasive. Because Tenn. Code Ann. § 26-2-104(b) does not provide debtors with a mechanism for enforcing a transfer restriction in qualifying pension plans, .t is not "enforceable," in the same sense that ERISA is enforceable. The Shumate Court noted ERISA's enforcement provisions included: plan trustees or fiduciaries are required under ERISA to discharge their duties in accordance with the governing plan; and participants, beneficiaries, fiduciaries, and the Secretary of Labor may all file civil actions to enjoin any acts which violate ERISA or the

terms of plan. 540 U.S. at 760. The Tennessee exemption statute contains no comparable enforcement provisions. fn14 Nor does it acquire enforcement provisions by virtue of its incorporation of 26 U.S.C. § 401.

Title 26 U.S.C. § 401, setting out the requirements for qualified pension, profit-sharing, and stock bonus plans, provides in relevant part:

(a) Requirements for qualification.–

(13) Assignment and alienation.–

(A) In general.–A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.

26 U.S.C. § 401(a)(13)(A).

In its pre-Shumate decision In re Leamon, the Bankruptcy Court ruled:

Accordingly, 401(a)(13) constitutes 'applicable nonbankruptcy law' under which restrictions on the transfer of the debtor's interest may be enforced. Under the clear and unambiguous language of § 541(c)(2), if the antialienation provisions mandated by IRC § 401(a)(13) are enforceable against general creditors, they are enforceable against the [bankruptcy] trustee.

Leamon, 121 B.R. 974, 982 (Bankr. E.D. Tenn. 1990) (citing In re Moore, 907 F.2d 1476, 1480 (4th Cir. 1990)).

Since Shumate, courts dealing with this question have more often concluded that § 401(a) of the Internal Revenue Code does not create any substantive rights a beneficiary or trustee may enforce. See Securities and Exchange Commission v. Johnston, 922 F. Supp. 1220, 1225 (E.D. Mich. 1996); In re Wilcox, 225 B.R. 151, 158 (Bankr. E.D. Mich. 1998); In re

Dunn, 215 B.R. 121, 126-28 (Bankr. E.D. Mich. 1997) (relying on Reklau v. Merchants Nat'l Corp., 808 F.2d 628 (7th Cir. 1986); Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888, 890 (1st Cir. 1978); and Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir. 1975), cert. denied, 423 U.S. 1034 (1975)); In re Witwer, 148 B.R. 930, 937 (Banks. C.D. Cal. 1992). This latter position is the better. While ERISA contains the substantive enforcement provisions noted and approved in Shumate, 504 U.S. at 760, § 40 1(a) contains nothing comparable.

Since neither Tenn. Code Ann. § 26-2-104(b) nor Internal Revenue Code § 401(a) contain enforcement provisions for purposes of 11 U.S.C. § 541(c)(2), the Tennessee statute does not prevent Dr. Yates's interest in the Plan, including his repayments to the Plan, from becoming part of the bankruptcy estate.

IV. CONCLUSiON

The Court AFFIRMS the findings of the Bankruptcy Court as to the following: Dr. Yates cannot participate in the Profit Sharing Plan under ERISA, and is ineligible to benefit from the protections of ERISA; Dr. Yates's interest in the Plan is not protected by the restriction on alienation contained in Tenn. Code Ann. § 26-2-104(b); the Chapter 7 Trustee may recover, pursuant to 11 U.S.C. § 550, avoidable transfers made by Dr. Yates to the Plan, to include the $50,467.46 loan repayment. The Court AFFIRMS the Bankruptcy Court's grant of summary judgment in favor of Plaintiff-Appellee, and denies Defendants-Appellants' petition for reversal.

An Order will enter.

CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Footnotes

fn1 This agreement provided for the revision and continuance of a substantially similar plan of the same name made effective in June of 1974.

fn2 The Plan and Dr. Yates in his capacity as trustee appear to have received the letter, which was addressed to Plan sponsor General Trust Company, from the trust company, and not from the IRS. The letter references the "Prototype Standardized Profit Sharing Plan with CODA."

fn3 Section 14 of the Adoption Agreement permitted the Plan to establish a participant loan program. The particular loan program adopted by the Plan was entitled "Model Loan Program," and was attached to the Adoption Agreement as an exhibit.

fn4 Dr. Yates originally borrowed from the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan. The loan transferred to the Profit Sharing Plan in 1992, when the Money Purchase Pension Plan merged into the Profit Sharing Plan (Rec. 13).

fn5 Title 11 U.S.C. § 547(b) provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made-
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

fn6 The Bankruptcy Court's statement that Dr. Yates's interest in the Plan was not ERISA-qualified came in the context of the court's response to Defendants-Appellants' argument the Bankruptcy Trustee had no power to recover Dr. Yates's loan repayments to the Plan. Defendants-Appellants argued the repayments were excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). The court, on the other hand, concluded the transferred funds were part of the bankruptcy estate, on the grounds 11 U.S.C. § 541(c)(2) had no application. The $50,467.46 flowed into Dr. Yates's portion of the Plan, and that portion was neither a spendthrift hind nor ERISA-qualified. The question of whether the $50,467.46 was, or was not, part of the bankruptcy estate lies at the heart of this case, and will be considered in detail, in connection with the remaining issues the Plan and Dr. Yates in his capacity as trustee have raised.

fn7 This section provides in part:
§ 732. Special rules relating to group health plans.

(d) treatment of partnerships. For purposes of this part–

(3) Participants of group health plans. In the case of a group health plan, the term "participant" also includes–

(B) in connection with a group health plan maintained by a self-employed individual (under which one or more employees are participants), the self-employed individual, if such individual is, or may become, eligible to receive a benefit under the plan or such individual's beneficiaries may

be eligible to receive any such benefit.

fn8 Because of the compelling applicability of Fugarino to the case before the Court, the applicability of Lowenschuss, the third case upon which the Bankruptcy Court relied need not be discussed at this point. Lowenschuss has greater application to Appellant's fourth issue, concerning the protections that may be available under State law.

fn9 As will be discussed in greater detail, in some cases, a debtor could argue, because the debtor's interest in a pension plan is ERISA protected, money repaid to the plan is likewise protected by ERISA, even if the repayment was otherwise subject to avoidance. Dr. Yates is not in a position to make this argument, because his interest in the Plan has never been protected.

fn10 29 U.S.C. § 1056(d)(1) provides:

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

fn11 As noted earlier, Dr. Yates claimed his entire interest in the Plan was exempt under Tenn. Code Ann. § 26-2-104(b). However, the Bankruptcy Court found the $50,467.46 repayment to the Plan was a preferential transfer, avoidable under Bankruptcy Code § 547(b) (Rec. 14, at 8-9). Thus, the approximately $36,000 to $38,000 interest in the Plan Dr. Yates had not borrowed was exempt under Tenn. Code Ann. § 26-2-104(b), but the $50,467.46 he had borrowed and repaid was not exempt. When Defendants-Appellants argued the Bankruptcy Trustee could not recover a preference from the Plan because Dr. Yates's interest in the Plan was exempt property under Tenn. Code Ann. § 26-2-104(b), the Bankruptcy Court properly ruled only a debtor can assert the exemption statute as a defense to a preference action (Rec. 14, at 12). Defendants-Appellants did not appeal the Bankruptcy Court's ruling on this issue. Defendants-Appellants' final argument on appeal relates not to whether the repayments could be exempted from the estate, but to

whether the repayments should have been excluded from the estate. The distinction between these two arguments may have caused Plaintiff-Appellee some confusion (Court File No. 4, at 15), to which Defendants-Appellants aptly responded (Court File No. 7, at 12). M exemption is personal to the debtor, and property claimed under an exemption is property of the bankruptcy estate which the debtor is permitted to exempt out of the estate. In re Everhart, 11 B .R. 770, 774 (Banks. N.D. Ohio 1981). In contrast, property excluded under 11 U.S.C. § 541(c)(2) was never part of the bankruptcy estate.

fn12 However, the statute did not allow exemption of contributions made within one year of the petition date, contributions in excess of$ 15,000 made within a one-year period, and fraudulent conveyances.

fn13 Lowenschuss created a split among the circuits as to whether the transfer restriction to which 11 U.S.C. §541 (c)(2) applies must be contained within the trust instrument. The Yuhas and Meehan courts had ruled the restriction need not be explicit in the trust instrument itself. Lowenschuss ruled the restriction must be contained in the pension plan itself. Lowenschuss, 171 F.3d at 683. The Court need not confront the conflict directly in this case. Both the pension plan in Lowenschuss and the Plan in the case before this Court contained transfer restrictions. At issue here is whether the State law enforced that restriction. However, the Court notes a bankruptcy court in the Western District of Pennsylvania followed Yuhas, and concluded 42 Pa. Cons. Stat. § 81 24(b)(1)(ix) does constitute a transfer restriction within the meaning of 11 U.S.C. § 541(c)(2). In re Fulton, 240 BR. 854, 861 (W.D. Penn. 1999).

fn14 The Plan and Dr. Yates in his capacity as trustee did not appeal the Bankruptcy Court's finding the Plan did not constitute a spendthrift trust under TCA 26-4-101 (Rec. 14, at 11).

No. 3:99-CV-600
Judge Curtis L. Collier

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff-Appellee,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, Trustee,
Defendants-Appellants.

Filed June 26, 2000

ORDER

In accordance with the accompanying Memorandum, the Court hereby AFFIRMS the decision of the Bankruptcy Court.

SO ORDERED.

ENTER:

CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Case No. 96-34511
Adv. Proc. No. 98-3088

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, and/or
QUICK & REILLY, Plan Adminstrator/Plan Trustee,
Defendants.

MEMORANDUM ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

APPEARANCES:
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Profit Sharing Plan, Raymond B. Yates, Plan Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The Chapter 7 Trustee, William T. Hendon, filed a Complaint on August 5, 1998, against Quick & Reilly, Inc., the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the Defendant Plan) and the Defendant Plan's trustee, Raymond B. Yates. The Trustee alleges that the Defendant Plan received from the Debtor, Raymond B. Yates, two transfers which constitute avoidable preferences under 11 U.S.C.A. § 547(b) (West 1993) and seeks to recover those transfers pursuant to 11 U.S.C.A. § 550 (West 1993 & Supp. 1999). fn1

This matter is before the court on cross motions for summary judgment. The Trustee filed a Motion for Summary Judgment on March 31, 1999, accompanied by a Plaintiff's Memorandum in Support of Motion for Summary Judgment. On the same date, the Defendants filed a Motion for Summary Judgment of Defendants Raymond B. Yates, M.D., P.C. Profit Sharing Plan and Raymond B. Yates, Trustee, accompanied by a Brief in Support of Motion for Summary Judgment. A Plaintiff's Response to Motion for Summary Judgment Filed by Defendant Plan and a Defendants' Response to Plaintiffs Motion for Summary Judgment were filed on April 20, 1999, and a Defendants' Reply to Plaintiffs Response to Defendant's Motion for Summary Judgment was filed on April 28, 1999.

The record before the court includes the following: the March 31, 1999 Affidavit of Raymond B. Yates; the February 19, 1997 Deposition of Raymond B. Yates, M.D.; the November 13, 1996 Deposition of Raymond B. Yates; the March 31 1999 Affidavit of C. Mark Troutman; the March 31, 1999 Affidavit of William T. Hendon; the Stipulation of Facts filed by the parties on June 28, 1999; the Statement of Financial Affairs, Schedules, Individual Debtor's Statement of Intention filed in the Debtor's case on April 15, 1997; the March 7, 1997 Settlement Statement relating to the sale of the Debtor's former home; the May 10, 1990 letter from the Chief of the Employee Plans Qualifications Branch of the Internal Revenue Service; the Qualified Plans Prototype Defined Contribution Plan and Trust Adoption Agreement #001 (Adoption Agreement) executed on July 20, 1990; the First Amendment to the Qualified Plans Prototype Defined

Contribution Plan and Trust Basic Document #01; a Promissory Note executed by the Debtor on December 13, 1989; an Irrevocable Pledge and Assignment executed by the Debtor on December 13, 1989; the Debtor's Participant Loan Application; and annual Trust Financial Reports for each of three years beginning July 1, 1992, and ending June 30, 1995, as well as Year-end Plan Valuations for the Raymond B. Yates, M.D., P.C. Profit Sharing Plan for each of three years beginning July 1, 1989, and ending June 30, 1992.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(F) (West 1993).

I

An involuntary petition was filed against the Debtor on December 2, 1996. An Order for. Relief was entered under Chapter 7 on February 27, 1997, and William T. Hendon was appointed trustee.

Raymond B. Yates, M.D., P.C., a professional corporation, is wholly owned by the Debtor. OnJuly2O, 1990, Raymond B. Yates, M.D., P.C. created the Raymond B. Yates, M.D., P.C. Profit Sharing Plan, the Defendant Plan in this adversary proceeding, by executing an Adoption Agreement. fn2 The Debtor signed the Adoption Agreement in his capacity as president of the named employer, Raymond B. Yates, M.D., P.C., and as trustee of the Defendant Plan. The Defendant Plan was modified by the First Amendment to the Qualified Plans Prototype Defined Contribution Plan and Trust Basic Document #01. By letter dated May 10, 1990, the Internal Revenue Service informed the Defendants that the Defendant Plan was "acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of employees."

The Debtor has been participating in the Defendant Plan as an employee. In that capacity, he was permitted to borrow against his interest in the Defendant Plan under the Model

Loan Program which was incorporated into the Defendant Plan by the Adoption Agreement. On December 13, 1989, the Debtor executed a Promissory Note in the principal amount of $20,000.00. The terms of the loan provided for an eleven percent rate of interest until default and a five-year repayment period, which was extended for another five years on June 12, 1992.

In addition, on December 13, 1989, the Debtor executed an Irrevocable Pledge and Assignment to secure the indebtedness to be repaid under the Promissory Note. In the Irrevocable Pledge and Assignment, the Debtor pledged and assigned to the trustee of the Defendant Plan "the Vested Employer Account Balance, at any time existing under the Plan, necessary to satisfy the loan which is the subject of this pledge, any unpaid interest on such loan, all attorneys' fees necessary for collection of this obligation and all costs of collection."

The Debtor failed to make regular payments on the Promissory Note and it remained outstanding until November 1996, when the Debtor made two payments to the Defendant Plan. On November 12, 1996, he paid $38,000.00 and on November 13, 1996, he paid $12,467.46. Together, the payments totaled $50,467.46 and represented the amount of principal and interest due under the Promissory Note. The Debtor used the proceeds from the sale of his home to make those payments. fn3

The record contains no financial reports for the Defendant Plan after June 30, 1995, however, the Debtor stated that his interest in the Defendant Plan was approximately $36,000.00 just prior to the $50,467.46 loan repayment, and approximately $87,000.00 after the repayment. In addition, the Debtor valued his interest in the Profit Sharing Plan at $89,000.00 in the schedules that he filed in his bankruptcy case. fn4

Article 18.02 of the Basic Document #01 is a "Spendthrift Clause" which provides as follows:

Except for Plan loans to Participants as permitted by ARTICLE 12 and the assignments provided therefor, no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily. The preceding sentence shall also apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be a qualified domestic relations order, as defined in Section 414(p) of the Code, or any domestic relations order entered before January 1, 1985.

II

The parties ask the court to resolve three issues:

1. Whether the repayment, within ninety days prior to the commencement of the Debtor's case, of $50,467.46 by the Debtor to the Defendant Plan is a preferential transfer, and therefore avoidable under Bankruptcy Code § 547(b)?

2. Whether the return of the funds paid by the Debtor to the Defendant Plan would be in direct violation of the disbursement provisions of the plan?

3. Whether the funds paid by the Debtor to the Defendant Plan represent a portion of the Debtor's interest in a qualified retirement plan and, as such, are excluded from his bankruptcy estate?

III

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is available only when a party is entitled to a judgment as a matter of law and when no genuine issues of material fact exist. See Hall v. Tollett, 128 F.3d 418, 421-22 (6th Cir. 1997). The substantive law of the underlying action will dictate which facts are material for the purposes of

summary judgment. See Gibson v. Gibson (In re Gibson), 219 B.R. 195, 199 (B.A.P. 6th Cir. 1998) (citing Hanover Ins. Co. v. American Eng 'g Co., 33 F.3d 727, 730 (6th Cir. 1994)).

In this matter, the substantive law concerned is § 547(b) of the Bankruptcy Code which ailows the trustee to avoid certain transfers of "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." Begier v. Internal Revenue Serv., 110 S. Ct. 2258, 2263 (1990). The law of preferential transfers is implicated in this matter because, had the Debtor not transferred the $50,467.46 in proceeds from the sale of his home to the Defendants, that property would have become property of the estate under 11 U.S.C.A. § 541 (West 1993 & Supp. 1999) fn5

Subsection 547(b) provides as follows:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent; (4) made-
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C.A. § 547(b).

The parties do not dispute that the Defendant Plan was a creditor of the Debtor or that the transfer was made on account of an antecedent debt, therefore § 547(b)(1) and § 547(b) (2) are established. The Defendants have not rebutted the presumption set by § 547(f) that the Debtor was insolvent on and during the ninety days immediately preceding the date of the filing of the petition, thus § 547(b)(3) is established. See 11 U.S.C.A. § 547(f) (West 1993). Also, the Defendants admit that the transfers were made in November, within ninety days of the filing of the Debtor's petition, satisfying § 547(b)(4).

Finally, regarding § 547(b)(5), courts may presume that when a debtor transfers property to an undersecured creditor, the creditor will first apply the transfer to the unsecured portion of the debt. See Hunter v. Snap-On Credit Corp. (In re Fox), 229 B.R. 160, 165 n.2 (Bankr. N.D. Ohio 1999) (citing Belfance v. Banchio/National Bank (In re McCormick), 5 B.R. 726, 729-30 (Bankr. N.D. Ohio 1980) (holding that the presumption comports with standard business practices)). Thus, § 547(b)(5) may be satisfied if the debtor transferred property to an undersecured creditor. See Bruinsma v. Citizens Banking Corp. (In re Fleming), 226 B.R. 3, 7 (Bankr. W.D. Mich. 1998). There is no dispute that the debt owing to the Defendant Plan was undersecured or that the Debtor's unsecured creditors will receive less than one hundred percent of their claims. See Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458, 465 (6th Cir. 1991) ("Unless the estate is sufficient to provide a 100% distribution, any unsecured creditor. . . who receives a payment during the preference period is in a position to receive more than it would receive under a Chapter 7 Liquidation."). Thus, the transfers to the Defendant Plan enabled it to receive more than it would have if the transfers had not been made and it received a distribution under the Bankruptcy Code. All of the elements of a preference are satisfied.

IV

The Defendants argue that the Trustee cannot recover the preferences from the Defendant Plan because there is a restriction on the transfer of the Debtor's interest in the Defendant Plan that is enforceable under the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C.A. §§ 1001, et seq. (West 1998) ("ERISA")).

ERISA was designed to protect employees from the improper administration of their pension plans by their employers. See Lowenschuss v. Selnick (In re Lowenschuss), 171 F.3d 673, 680 (9th Cir. 1999), petition for cert. filed (U.S. July 27, 1999) (No. 99-187). Employees and employers are therefore considered separated entities under ERISA. See Fugarino v. Hartford Life and Accident Ins. Co., 969 F.2d 178, 186(6th Or. 1992), cert. denied, 113 5. Ct. 1401 (1993). That point is explained in the Code of Federal Regulations:

> An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse.

29 C.F.R. § 2510.3-3(c)(1) (1998). Accordingly, an employer cannot be an employee or a participant under ERISA and is not eligible to benefit from its protections. See Securities and Exchange Comm. v. Johnston, 143 F.3d 260, 262 (6th Cir. 1998) (citing Fugarino, 969 F.2d at 185-86); Lowenschuss, 171 F.3d at 680. Self-employed owners of businesses that sponsor pension plans "were deliberately excluded from ERISA's protections because these individuals can protect their own beneficial interests in the plans." Lowenschuss, 171 F.3d at 680.

The Debtor in this matter is a self-employed owner of the professional corporation that sponsors the pension plan at issue. He cannot participate as an employee under ERISA and he cannot use its provisions to enforce the restriction on the

transfer of his beneficial interest in the Defendant Plan.

V

The Defendants also argue that the Plan's transfer restrictions and disbursement provisions are enforceable against the Trustee under the terms of the Plan, but provide no authority to support that argument. Tennessee does allow spendthrift trusts pursuant to TENN. CODE ANN. § 26-4-101 (1980 & Supp. 1998), which outlines express spendthrift trust requirements. To supplement those statutory requirements, courts require "that the trust must be an "active" rather than a "dry" trust, which basically means that the property must be under the control of the trustee rather than the debtor-beneficiary.'" In re Faulkner, 79 B.R. 362, 366 (Bankr. E.D. Tenn. 1987) (citation omitted) (quoting In re Elsea, 47 B.R. 142, 148-49 (Bankr. E.D. Tenn. 1985)) (overruled by Patterson v. Shumate, 112 S. Ct. 2242 (1992) only to the extent that Faulkner limited the application of 11 U.S.C. § 541(c)(2) to pension plans exclusively to spendthrift trust law). Under Tennessee law, a pension plan is not a spendthrift trust if the plan permits a participant to borrow from his interest in the plan and use his vested interest in the plan as security. See id. This court has previously explained,

> The clear impact of [the loan provision] is to provide the debtor-participant ready access at any time to his vested interest in the Plan. One can easily envision a situation arising at the time a Plan participant becomes entitled to benefits under the Plan where those benefits have been fully encroached upon through loans . . . . The anti-alienation provisions and anti-assignment provisions . . . of the Plan have thus been avoided and rendered meaningless.
>
> Id.

Under the Defendant Plan, a participant may borrow against his interest in the Defendant Plan. In addition, under the Defendant Plan, the "only security acceptable to secure a loan is one-half of the vested account balance of an

employee." Model Loan Program at 3. As explained in Faulkner, the anti-alienation provisions of the Defendant Plan may be avoided and are meaningless. Accordingly, the Defendant Plan is not a spendthrift trust under Tennessee law and its anti-alienation provision is not enforceable against the Trustee.

VI

The Defendants also argue that the Trustee may not recover a preference from the Defendant Plan because the Debtor's interest in the Defendant Plan is exempt property. They argue that TENN. CODE Area. § 26-2-104(b) (Supp. 1998) prevents the Trustee from disgorging the Debtor's interest in the Plan. That subsection provides in material part:

> [A]ny funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 403(a), 403(b), and 408 of the federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee.
>
> TENN. CODE ANN. § 26-2-104(b).

Although the Debtor's interest in the Defendant Plan may be exempt property, the Defendants cannot assert the exemption statute as a defense to this preference action. See Joelson v. Tiffin Say. Bank (In re Everhart), 11 B.R. 770, 772 (Bankr. N.D. Ohio 1981) (deciding that a defendant cannot assert a debtor's exemption as a defense in a preference action). Only a debtor may claim an exemption. See 11 U.S.C.A. § 522(b) (West 1993 & Supp. 1999); Taunt v. General Retirement Sys. (In re Wilcox), 225 B.R. 151, 155 (Bankr. E.D. Mich. 1998) ("It is well established that assertion of an exemption under bankruptcy law is personal to the debtor."); Everhart, 11 B.R. at 772. Even if the Defendants could raise the exemption as a defense, it would be of little consequence because exempt property is property of the estate; thus,

exempt property "must first go into the estate and from there only may [it] be exempted out." Everhart, 11 B.R. at 774.

VII

Finally, the Defendants argue that the Trustee has no power to recover a preference from property that would be excluded from the estate. The court need not resolve that issue because the Debtor's interest in the Defendant Plan is not excluded from property of the estate by 11 U.S.C.A. § 541(c)(2) (West 1993). Bankruptcy Code § 541 provides, with some exceptions, that the commencement of a case creates an estate comprised of all legal and equitable interests of a debtor in property as of that date. See 11 U.S.C.A. § 541(a)(1) (West 1993). One exception is set forth in § 541 (c)(2), which provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." Id. at (c)(2). Although a debtor's interest in a pension plan may be excluded from property of the estate under § 541(c)(2) if it is held in a spendthrift trust or in an ERISA-qualified plan, see Patterson v. Shumate, 112 S. Ct. 2242, 2246-47 (1992), that point is irrelevant in the present matter because the Debtor's interest is not in a spendthrift trust or ERISA-qualified plan.

Further, the Tennessee exemption statute cannot be construed as enforcing "[a] restriction on the transfer of a beneficial interest of the debtor in a trust" under § 541(c)(2). In Lowenschuss, the Ninth Circuit confronted that argument with regard to a Pennsylvania exemption statute. See Lowenschuss, 171 F.3d 673, 682 (9th Cir. 1999). It decided that a debtor could not use the exemption statute to exclude his interest in a pension plan from the estate under § 541(c)(2) and Patterson. The court based that decision on the fact that the statute lacked enforcement provisions of the type cited by the Supreme Court in Patterson. See Id. In Patterson, the Supreme Court concluded that ERISA enforced a pension plan's transfer restrictions by providing civil remedies to participants. See id. (citing Patterson, 112 5.

Ct. at 2247). The Pennsylvania exemption statute did not provide civil remedies or other enforcement mechanisms. See Id. The Ninth Circuit also explained that the Pennsylvania exemption "operates without regard to a transfer restriction that may be contained in the trust instrument." Id. fn6

Like the Pennsylvania exemption, TENN. CODE ANN. § 26-2-104(b) does not provide debtors with a mechanism for enforcing a transfer restriction in qualifying pension plans and it operates without regard to the particular transfer restriction that may be contained in the pension plan. Thus, § 26-2-104(b) does not enforce the restriction on the transfer of the Debtor's interest in the Defendant Plan. The Debtor's interest in the plan is not excluded from property of the estate under § 541(c)(2) and the court need not reach the argument that property excluded from the estate is beyond the reach of a trustee's power to avoid and recover preferential transfers.

VIII

There are no genuine issues of material fact in dispute in this adversary proceeding and summary judgment is appropriate. The Trustee has met his burden of proving the elements of a preferential transfer. The Defendants' arguments against the ability of the Trustee to recover the transfers are without merit. Accordingly, the Trustee may avoid the November 12 and 13, 1996 transfers from the Debtor to the Defendant Plan and may recover those transfers from the Defendant Plan. fn7 The Trustee's Motion for Summary Judgment will be granted and the Defendants' Motion for Summary Judgment will be denied. A judgment will be entered consistent with this Memorandum.

FILED: September 2, 1999

BY THE COURT

RICHARD STAIR, JR
UNITED STATES BANKRUPTCY JUDGE

Footnotes

fn1 The action was dismissed as to Defendant Quick & Reilly, Inc. by an Agreed Order entered October 19, 1998.

fn2 The Adoption Agreement provides that the Defendant Plan "amends, restates, and continues [a prior plan] which was originally effective on June 15, 1974."

fn3 Although the Settlement Statement for the sale of the home is dated March 7, 1997, the Trustee stated in his March 31, 1999 Affidavit that the sale actually closed in October 1996. That fact is undisputed.

fn4 On Schedule C, the Debtor claimed that his interest in the Defendant Plan, $89,000.00, was exempt under TENN. CODE ANN. § 26-2-104(b) (Supp. 1998).

fn5 11 U.S.C.A. § 541(a) provides, in material part, that the commencement of a case in bankruptcy creates an estate which includes, with some exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case."

fn6 The Lowenschuss decision created a circuit split, setting the Ninth Circuit against the Third and Eleventh Circuits, on "the issue of whether the 'restriction' to which 11 U.S.C. § 541(c)(2) refers must be contained within the trust instrument." Lowenschuss, 171 F.3d at 683. Because the pension plan in the present matter did contain a trust instrument, that question is not at issue here.

fn7 Once a transfer is avoided under § 547, the Trustee is entitled to recover the property transferred from "the initial transferee of such transfer or the entity for whose benefit the transfer was made." 11 U.S.C.A. § 550(a)(1) (West 1993).

Case No. 96-34511
Adv. Proc. No. 98-3088

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, Trustee,
Plaintiff,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN,
and RAYMOND B. YATES, and/or
QUICK & REILLY, Plan Adminstrator/Plan Trustee,
Defendants.

JUDGMENT

For the reasons stated in the Memorandum on Cross Motions for Summary Judgment filed this date, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Motion for Summary Judgment of Defendants Raymond B. Yates, M.D., P.C. Profit Sharing Plan and Raymond B. Yates, Trustee, filed by the Defendants Raymond B. Yates, M.D., P.C. and Raymond B. Yates, Trustee, on March 31, 1999, is DENIED.

2. The Motion for Summary Judgment filed by the Plaintiff William T. Hendon, Trustee, on March 31, 1999, is GRANTED.

3. The transfers from the Debtor, Raymond B. Yates, to the Defendant Raymond B. Yates, M.D., P.C. Profit Sharing Plan on November 12 and 13, 1996, in the amounts of $38,000.00 and $12,467.46, respectively, are avoided pursuant

to 11 U.S.C.A. § 547(b) (West 1993).

4. The Plaintiff shall recover from the Defendant Raymond B. Yates, M.D., P.C. Profit Sharing Plan, for the benefit of the estate, the amount of the avoided transfer, $50,467.46, pursuant to 11 U.S.C.A. § 550(a)(1) (West 1993).

ENTER: September 2, 1999

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Notice sent to:

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United States Trustee
800 Market Street, Suite 114
Howard H. Baker, Jr. US Courthouse
Knoxville, TN 37902

00-6023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: RAYMOND B. YATES,
Debtor.

WILLIAM T. HENDON, TRUSTEE.
Appellee,

v.

RAYMOND B. YATES, M.D.,
P.C. PROFIT S HARING PLAN, ET AL.,
Appellants.

Filed June 20, 2002

ORDER

BEFORE: NELSON, CLAY, and GARWOOD,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judge** having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Footnotes

*Hon. Will L. Garwood, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sifting by designation.

**As a Senior Judge, Judge Nelson was not eligible to vote on the petition for rehearing. Had he been able to do so, Judge Nelson would have voted in favor of granting the petition.

TITLE 29–LABOR

CHAPTER XXV–PENSION AND WELFARE BENEFITS ADMINISTRATION, DEPARTMENT OF LABOR

PART 2510–DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER—
Table of Contents

Sec. 2510.3-3 Employee benefit plan.

(a) General. This section clarifies the definition in section 3(3) of the term ``employee benefit plan'' for purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to title I.

(b) Plans without employees. For purposes of title I of the Act and this chapter, the term ``employee benefit plan'' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called ``Keogh'' or ``H.R. 10'' plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I.
Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to title I.

(c) Employees. For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

(d) Participant covered under the plan. (1)(i) An individual becomes a participant covered under an employee welfare benefit plan on the earlier of–

(A) The date designated by the plan as the date on which the individual begins participation in the plan;

(B) The date on which the individual becomes eligible under the plan for a benefit subject only to occurrence of the contingency for which the benefit is provided; or

(C) The date on which the individual makes a contribution to the plan, whether voluntary or mandatory.

(ii) An individual becomes a participant covered under an employee pension plan–

(A) In the case of a plan which provides for employee contributions or defines participation to include employees who have not yet retired, on the earlier of–

(1) The date on which the individual makes a contribution, whether voluntary or mandatory, or

(2) The date designated by the plan as the date on which the individual has satisfied the plan's age and service requirements for participation, and

(B) In the case of a plan which does not provide for employee contributions and does not define participation to include employees who have not yet retired, the date on which the individual completes the first year of employment which may be taken into account in determining–

(1) Whether the individual is entitled to benefits under the plan, or

(2) The amount of benefits to which the individual is entitled, whichever results in earlier participation.

(2)(i) An individual is not a participant covered under an employee welfare plan on the earliest date on which the individual–

(A) Is ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur, and

(B) Is not designated by the plan as a participant.

(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if–

(A) The entire benefit rights of the individual–

(1) Are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and

(2) A contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; or

(B) The individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

(3)(i) In the case of an employee pension benefit plan, an individual who, under the terms of the plan, has incurred a one-year break in service after having become a participant covered under the plan, and who has acquired no vested right to a benefit before such break in service is not a participant covered under the plan until the individual has completed a year of service after returning to employment covered by the plan.

(ii) For purposes of paragraph (d)(3)(i) of this section, in the case of an employee pension benefit plan which is subject to section 203 of the Act the term ``year of service'' shall have the same meaning as in section 203(b)(2)(A) of the Act and any regulations issued under the Act and the term ``one-year break in service'' shall have the same meaning as in section 203(b)(3)(A) of the Act and any regulations issued under the Act.

26 U.S.C. § 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification

A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section -

(13) Assignment and alienation. -

(A) In general. - A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders. -

Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

(C) Special rule for certain judgments and settlements. -

Subparagraph (A) shall not apply to any offset of a participant's benefits provided under a plan against an amount that the participant is ordered or required to pay to the plan if -

(i) the order or requirement to pay arises -

(I) under a judgment of conviction for a crime involving such plan,

(II) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, or

(III) pursuant to a settlement agreement between the Secretary of Labor and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of such subtitle by a fiduciary or any other person,

(ii) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(iii) in a case in which the survivor annuity requirements of section 401(a)(11) apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made -

(I) either such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 417(a)(2)(B)), or an election to waive the right of the spouse to either a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 417(a),

(II) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of such subtitle, or

(III) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 401(a)(11)(A)(i) and under a qualified preretirement survivor annuity provided pursuant

to section 401(a)(11)(A)(ii), determined in accordance with subparagraph (D).

A plan shall not be treated as failing to meet the requirements of this subsection, subsection (k), section 403(b), or section 409(d) solely by reason of an offset described in this subparagraph.

(D) Survivor annuity. -

(i) In general. - The survivor annuity described in subparagraph (C)(iii)(III) shall be determined as if -

(I) the participant terminated employment on the date of the offset,

(II) there was no offset,

(III) the plan permitted commencement of benefits only on or after normal retirement age,

(IV) the plan provided only the minimum-required qualified joint and survivor annuity, and

(V) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(ii) Definition. - For purposes of this subparagraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 411(a)(7)) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the

protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which -

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member

of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1056. Form and payment of benefits

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 of title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph -

(i) the term "qualified domestic relations order" means a domestic relations order -

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the

right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs

(C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which -

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies -

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order -

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee -

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of -

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order -

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan -

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures -

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v) -

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved, then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would

have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in -

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H), then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 1673(a) of title 15.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension

benefit plan against an amount that the participant is ordered or required to pay to the plan if -

(A) the order or requirement to pay arises -

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle, or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 1055 of this title apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made -

(i) either -

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 1055(c)(2)(B) of this title), or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 1055(c) of this title,

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity

under a qualified joint and survivor annuity provided pursuant to section 1055(a)(1) of this title and under a qualified preretirement survivor annuity provided pursuant to section 1055(a)(2) of this title, determined in accordance with paragraph (5).

A plan shall not be treated as failing to meet the requirements of section 1055 of this title solely by reason of an offset under this paragraph.

(5)(A) The survivor annuity described in paragraph (4)(C)(iii) shall be determined as if -

(i) the participant terminated employment on the date of the offset,

(ii) there was no offset,

(iii) the plan permitted commencement of benefits only on or after normal retirement age,

(iv) the plan provided only the minimum-required qualified joint and survivor annuity, and

(v) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(B) For purposes of this paragraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 1002(23) of this title) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.